United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2000

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P/S

To be argued by
DANIEL ROSEN

In The

United States Court of Appeals

For The Second Circuit

AUTOMATIC RADIO MFG. CO., INC., and MERIT INTERNATIONAL CORP.,

Plaintiffs-Appellants,

- against -

CROWN RADIO CORPORATION (JAPAN) and CROWN RADIO CORPORATION (NEW YORK),

Defendants-Appellees.

On Appeal from an Order from the United States District Court — Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
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-against-

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On Appeal from the United States District Court
for the Southern District of New York.

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal from an order made by Judge Carter in the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT OF NEW YORK, granting the motion of the defendants-appellees, dismissing the complaint of the plaintiff-appellants, upon the ground that the question of jurisdiction over the subject matter of the action had previously been decided by Judge Motley upon a motion to dismiss in a prior action. Judge Carter held that the prior determination by Judge Motley constituted res judicata on the question of jurisdiction in this action (135a-136a).

In 1971, a summons and complaint was served upon an individual ELLIS G. ROSEN, whom the plaintiffs believed to be a representative of the defendant CROWN RADIO CORPORATION (53a-70a). The Marshal served process at an office located in the City and State of New York.

The defendant, in the prior action,

moved to dismiss the summons and complaint upon the ground that the Court did not have jurisdiction over the person of the defendant on the basis of improper service of process in that ELLIS G. ROSEN, the individual served by the Marshal, was not if fact a representative of the named defendant (6a-13a).

Judge Motley granted the dismissal motion and found factually that ELLIS G. ROSEN was not a proper person to be served with process sufficiently to confer jursidiction over the person of the named defendant (71a-83a).

After the granting of the dismissal motion by Judge Motley of this first action, this second action naming two defendants, CROWN RADIO CORPORATION (JAPAN) and CROWN RADIO CORPORATION (NEW YORK) was commenced by the service of a summons and complaint upon the defendant CROWN RADIO CORPORATION (JAPAN) pursuant to the Geneva Treaty of 1965 (29a-43a), and upon the defendant CROWN RADIO CORPORATION (NEW YORK), a New York corporation, by the service of process upon the Secretary of State of the State of New York (87a-99a). The de-

fendants-appellees have not contested jurisdiction over their person and have not attacked the method of service of process in this action. Only one defendant-appellee, CROWN RADIO CORPORATION (JAPAN) moved to dismiss before the Court below, alleging and claiming that the decision of Judge Motley in the prior action was res judicata, mandating a dismissal of the complaint in this action against CROWN RADIO CORPORATION (JAPAN) which was admittedly never served in the first action (44a-52a).

Judge Carter held and decided that notwithstanding the fact that CROWN RADIO CORPORATION (JAPAN) had concededly not been served with process in the first action, and that the Court in the first action did not have jurisdiction over the person of CROWN RADIO CORPORATION (JAPAN) (as Judge Motley stated), nevertheless, Judge Carter held that Judge Motley was correct in deciding on the first motion that the Court did not have subject matter jurisdiction over the defendant CROWN RADIO CORPORATION (JAPAN) whose person was not before the Court.

STATEMENT OF FACTS

Plaintiffs-appellants complaint alleges six causes of action against the defendants-appellees. The first cause of action is for breach of agreement, the second for breach of warranty, the third for fraud in the inducement, the fourth for wilful and malicious fraud, the fifth for a permanent injunction restraining the defendants-appellees from manufacturing, offering to sell, selling, advertising and soliciting orders for certain products manufactured and sold by the defendants-appellees, and which products were restricted exclusively to plaintiffs-appellants; and the sixth and last cause of action is for an accounting on the number of products sold by the defendants-appellees in New York City and other locales (54a-70a).

These causes of action are based upon agreements and warranties and representations made to the plaintiffs-appellants by CROWN (JAPAN). The agreement was breached in that CROWN (JAPAN) agreed (see exhibits) that it would not, if the plaintiffs-appellants purchased its products and

o them the design engineered by the plain-
manufacture any cassette recorder players
les to anyone else, without the prior written
t of the plaintiffs-appellants. The exact
ge of the agreement was as follows (125a-

> "This model is for the exclusive and permanent use for Automatic Radio only. No similar and/or associated model shall be offered to other persons or companies without the express written consent of Automatic Radio."

As assurance to the plaintiffs-appellants
is agreement would not be breached, CROWN
warranted and represented to the plaintiffs-
nts that it had formed a corporation in New
nown as "Crown Radio Corporation", that it
d controlled most of the stock in said cor-
n, that through its voting stock it named the
rs and officers in said corporation, some of
re common to CROWN (JAPAN), that it was the
f CROWN (JAPAN), and was restricted to selling
ose products manufactured by CROWN (JAPAN),
vely. Further, CROWN (JAPAN) warranted and

ented that it controlled all products manufact-
y it and sold in the United States through its
and alter ego, CROWN (NEW YORK). Finally CROWN
) warranted and represented that it had offices
ious cities of the world, including New York and
ancisco (see exhibits, 123a, 124a, 128a, 130a).

In reliance upon this information, plain-
appellants' attorney caused the first summons
nplaint to be served at the office located at
46th Street, New York City, believing it to
office of CROWN (NEW YORK).

The second summons and complaint in this
have now been properly served, and the parties
w been properly designated therein.

STATEMENT OF THE ISSUES PRESENTED

1. The Court not having any jurisdiction
e person of CROWN RADIO CORPORATION (JAPAN)
first action, had no reason or judicial power
nto and decide issues as to subject matter
ction; and the Court below erred in its finding
second motion that the decision on the prior
constituted res judicata as to this action where

for the first time service of process has been properly made upon the defendant-appellee CROWN RADIO CORPORATION (JAPAN) by the plaintiffs-appellants.

2. The Court below erred in failing to properly apply the provisions of Section 302 of the New York Civil Practice Law and Rules to the acts of the defendant-appellee in the State of New York.

ARGUMENT

I

THE ISSUE OF JURISDICTION OVER CROWN RADIO CORPORATION (JAPAN) IS NOT RES JUDICATA

The order of Judge Carter holding the issue of personam jurisdiction over the person of CROWN RADIO CORPORATION (JAPAN) to be res judicata was predicated upon a decision made by Judge Motley on a prior motion after the service of a first complaint upon the wrong person. At the time of service, the plaintiffs-appellants were under the erroneous impression that ELLIS G. ROSEN was an officer of CROWN

RADIO CORPORATION (JAPAN) and that the office located in New York City was the office of CROWN RADIO CORPORATION (JAPAN).

Based upon the affidavit submitted on the first notice of motion to dismiss made by the defendants-appellees, the plaintiffs-appellants learned that ELLIS G. ROSEN was a manufacturer's representative of CROWN RADIO CORPORATION (NEW YORK), and consequently CROWN RADIO CORPORATION (JAPAN) was in fact never served and therefore not a party in the first action, nor subject to the jurisdiction of the Court in said action (8a-13a).

Although CROWN RADIO CORPORATION (JAPAN) was never served as a party to the action, nevertheless Judge Motley went into the question of subject matter jurisdiction over a defendant not before the Court.

After learning of the exact corporate setup, a second complaint was drawn in a new action and served on the defendant-appellee CROWN RADIO CORPORATION (NEW YORK) through the Secretary of State of New York and the copies thereof in the English and Japanese languages were served upon CROWN RADIO

CORPORATION (JAPAN), in Japan, through the Ministry of Foreign Affairs as provided for by the Treaty of 1965.

The defendants-appellees do not contest the service upon both defendant-appellees, conceding that service of the second complaint was proper in each case.

The complaint in the second action alleges that CROWN RADIO CORPORATION (NEW YORK) is the wholly owned subsidiary of CROWN RADIO CORPORATION (JAPAN), its agent for the service of CROWN RADIO CORPORATION (JAPAN) products in the United States, and that sales of CROWN RADIO CORPORATION (JAPAN) products were made by CROWN RADIO CORPORATION (NEW YORK) within the State of New York, although the office of CROWN RADIO CORPORATION (NEW YORK) is located in California.

ARGUMENT

I.

THE ISSUE OF JURISDICTION OVER
CROWN RADIO CORPORATION (JAPAN)
IS NOT RES JUDICATA

The decision of Judge Carter that the issue of jurisdiction over the person of CROWN RADIO CORPORATION (JAPAN) is now res judicata (135a-136a), is predicated upon a decision made by Judge Motley (71a-83a) after the service of a first complaint upon the wrong person, on the assumption by the plaintiffs that the person so servedwas an officer of CROWN RADIO CORPORATION (JAPAN) and that the office located in New York City was the office of CROWN RADIO CORPORATION (JAPAN).

As previously indicated in the affidavits submitted in opposition to the instant motion (100a-131a), a second complaint (87a-99a; 29a-40a) was served in this action upon the proper parties, to wit;CROWN RADIO CORPORATION (JAPAN) and its agent and alter ego, CROWN RADIO CORPORATION (NEW YORK). This latter corporation is a New York corporation based

in San Francisco, California. The correction as to the proper parties to be served and their relationship to each other, was corrected in the second complaint served in the action.

The first complaint (94a-70a) served in the action alleged the New York office to be the office of CROWN RADIO CORPORATION (JAPAN), whereas the second complaint alleges that CROWN RADIO CORPORATION (NEW YORK) is the wholly owned subsidiary of CROWN RADIO CORPORATION (JAPAN) and its agent for the sale of CROWN RADIO CORPORATION (JAPAN) products in the United States and that sales of CROWN RADIO CORPORATION (JAPAN) products were made by CROWN RADIO CORPORATION (NEW YORK), its agent, within the State of New York. Since there is no dispute as to the venue in this action, nor any denial that sales by CROWN RADIO CORPORATION (NEW YORK) were made to the manufacturers representative, Ellis G. Rosen, Ltd., in New York, this Court can readily distinguish between the first and second complaints served in the action.

While a successful challenge under Rule 12 (b)(2) normally will result in an Order dismis-

sing the action, the denial of a motion to dismiss a complaint for a lack of jurisdiction over defendant's person or a lack of in rem or quasi-in-rem jurisdiction, or the grant of such a motion that does not dispose of the entire action is not a final adjudication and particularly is not appealable; nor does the grant of a Rule 12 (b)(2) motion prejudice plaintiffs' right to file another complaint in the expectation that the Court will be able to obtain jurisdiction. Furthermore, a party who has unsuccessfully raised an objection under Rule 12 (b)(2) may proceed to trial on the merits without waiving the challenge.

In Columbia Boiler Co. v. Hutheson, C.A. 4th, 1955, 222 F. 2d 718, the Court stated that an Order denying a motion to dismiss the complaint for lack of personal jurisdiction is not a final Order and is not appealable.

The rule was even more specifically stated in Orange Theatre Corp. v. Rayherstz Amusement Corp., C.A. 3d, 1944, 139 F. 2d 871, 875 certiorari denied 64S. Ct. 1057, 322 U.S. 740, 88 L.Ed 1573. In that case the Court stated:

> "The dismissal of the complaint in such a situation, however, results solely from the lack of jurisdiction of the Court and is, therefore not an adjudication of the merits of the case of action. Consequently such a dismissal does not prejudice the right of the plaintiff to file another complaint when and if it appears that the Court may obtain jurisdiction of the person of the defendant" (underscoring ours)

This same rule was followed in the case of Bucholz v. Hutton, D.C. Mont. 1957, 153 F. Supp. 62, 68.

The justice motivating this rule with respect to res judicata on intermediate Orders is predicated upon the fact that a plaintiff may in his second complaint set forth the allegations which might either under discovery or upon the trial of the issues result in jurisdiction of the Court over the defendant, thus allowing the plaintiff his day in Court and the opportunity of obtaining redress for any wrong perpetrated against said plaintiff by a defendant.

The fact of the matter is that the Courts have gone even further to insure such justice by declaring that the moving party may proceed to trial on the merits without ever waiving the question of jurisdiction over a particular defendant. This

principle was clearly set forth in Speir v. Robert C. Herd & Co. D.C. Md. 1960, 189 F. Supp. 436.

When a Court is considering a challenge to its jurisdiction over defendant or over a res, it may receive and weight affidavits; matters of jurisdiction are very often not apparent on the face of the summons or complaint. Under such conditions, the law is well settled that it is more desirable to hold in abeyance a decision on a motion to dismiss for lack of personal jurisdiction. Doing so enables the parties to employ discovery on the jurisdictional issue which might lead to a more accurate judgment than one made solely on the basis of affidavits. Rule 12 (d) gives the Court discretion to delay its determination of the motion.

As may be readily observed from the second complaint filed in this action, the allegations set forth therein do plead facts sufficient to establish jurisdiction over the person of the defendant CROWN RADIO CORPORATION (JAPAN). The Federal Courts have held that an affidavit filed in support of a motion to dismiss under Rule 12 (b)(2) cannot be viewed as presenting facts contrary to well pleaded allegations

in the complaint, respecting jurisdiction. See Canuel v. Oskoian D.C. R.I. 1959 23 F.R.D. 307, 312, affirmed C.A. 1st, 1959, 269 F. 2d 311; also, Metropolitan Theatre Co. v. Warner Bros. Pictures, Inc. D.C.N.Y. 1954, 16 F.R.D. 391.

In Snow v. Clark, D.C. Va 1967, 263 F. Supp. 66, the Court held that for the purposes of determining jurisdiction over the person, where a motion to dismiss had been made by the defendant, the allegations in the plaintiff's complaint which were not patently frivolous would be taken as true.

In the present action the allegations of the complaint do aver that CROWN RADIO CORPORATION (JAPAN) through its agent and alter ego, a New York corporation known as "CROWN RADIO CORPORATION (NEW YORK)", sold products in New York, the manufacture and sale of which was expressly prohibited by the agreement made with plaintiffs. Not only do the affidavits submitted in support of the motion of CROWN RADIO CORPORATION (JAPAN) fail to deny such sales in New York by CROWN RADIO CORPORATION (NEW YORK), the agent and alter ego of CROWN RADIO CORP-ORATION (JAPAN), but on the contrary, confirm such

fact. In the affidavit of Ellis G. Rosen, (12a-13a) submitted on the first motion he stated therein:

> "My firm acts as a manufactures representative for several firms in the New York area, including *** * * and Crown Radio Corporation, a California based corporation, not the defendant herein, (hereinafter "Crown Radio Corporation (San Francisco")".

Of course, the "Crown Radio Corporation (San Francisco" referred to therein is the corporation designated in the second action and in this motion as CROWN RADIO CORPORATION (NEW YORK), and which corporation was not named as a defendant in the first complaint served by the plaintiffs.

The Courts being loathe to dismiss a complaint for lack of jurisdiction over the person and thus denying a plaintiff his day in Court where he has been wronged by a defendant, have extended advantages to such plaintiffs, not only by holding that the denial of the defendant's motion to dismiss is not a waiver of the renewal of such motion after the issues of fact are tried, but have also reserved such motions for the trial in order to permit the plaintiff the use of interrogatories,

as well as discovery proceedings.

In Fraley v. Chesapeake & Ohio Ry. Co., C.A. 3d, 1968, 397, F. 2d 1., the Court held that the failure to direct use of interrogatories to aid in determining whether defendant was "doing business" in order to establish in personam jurisdiction was improper. See also, Collins v. New York Cent. Sys., C.A. 1963, 327 F. 2d 880, 117 U.S. App. D.C. 18.; Urquhart v. America-La France Foamite Corp., C.A. 1944, 144 F. 2d 542, 79 U.S. App. D.C. 219, certiorari denied 65 S. Ct., 273, 323 U.S. 783, 89 L. Ed. 625.

In Goldstein v. Compudyne Corp., D.C.N.Y. 1966, 262 F. Supp. 524, the Court went as far as to hold that when allegations in the complaint were insufficient to establish that a nonresident manufacturer transacted business in New York so as to be subject to the in personam jurisdiction of the federal district Court, discovery proceedings could be undertaken to determine whether the claim for relief arose out of the manufacturer's transactions in New York. See also, Ziegler Chem. & Mineral Corp. v. Standard Oil of California, D.C. Cal. 1962, 32 F.R.D. 241.; General Indus. Co. v. Birmingham

Sound Reproducers, Ltd., D.C.N.Y. 1961, 26 F.R.D. 559; River Plate Corp. v. Forestal Land, Timber & Ry. Co., D.C.N.Y. 1960, F. Supp. 832; Anderson v. British Overseas Airways Corp., D.C.N.Y. 1956, 149 F. Supp. 68; Lopinsky v. Hertz Drive-Ur-Self Sys., Inc., D.C.N.Y. 1951, 11 F.R.D. 553, affirmed on other grounds C.A. 2d, 1951, 194 F. 2d 422.

There is much precedent for deferred rulings and determinations on motions made under Rule 12 (b) (2). See Metropolitan Sanitary Dist. of Greater Chicago v. General Elec. Co., D.C. Ill. 1962, 208 F. Supp. 943.; Ziegler Chem. & Mineral Corp. v. Standard Oil of California, D.C. Cal. 1962, 32 F.R.D. 241; Schramm v. Oaks, C.A. 10th, 1965, 352 F. 2d 143; Andreas v. Imperial Airlines, Inc., D.C. Pa. 1962, 211 F. Supp. 311; Adams v. Boyer Chem. Co., D.C. Pa. 1960, 188 F. Supp. 815.

The Courts have stated that the allegations in a complaint must be read as true on any Rule 12 (b) motion. The logic behind this construction is quite obvious. If the motion is denied and the plaintiffs fail to establish jurisdiction over the person upon the trial of the action, the defendant

may still move to dismiss under Rule 12 (b)(2). On the other hand, if the plaintiffs can establish jurisdiction upon the trial then a grievous miscarriage of justice has been prevented. Hence, the courts have taken the position that for the purposes of the motion, the allegations must be deemed to be true as pleaded. See Oppenheim v. Sterling, C.A. 10th, 1966 386 U.S. 1011, 18 L. Ed. 2d 441; Bowdoin v. Malone, C.A. 5th 1961 287 F. 2d 282; Niece v. Sears, Roebuck & Co., D.C. Okl. 1968, 293 F. Supp. 792; Britt v. Cyril Bath Co., D.C. Ohio 1968, 290 F. Supp. 934.; Lundell v. Massey-Ferguson Servs. N.V., D.C. Iowa 1967, 277 F. Supp. 940; Hill v. ARO CORP., D.C. Ohio 1967, 275 F. Supp. 482. This is particularly true where the allegations bear on questions of agency or the nexus between the claim or the parties and the forum for purposes of determining the applicability of a long arm statute.

Subsection ("d") of Rule 12 states that the defenses enumerated under Rule 12 (b)(2) whether made in a pleading or by motion, may upon the Court's order be deferred until the trial of the issues concerned with the jurisdiction question.

It it the plaintiffs' position that the Order of Judge Motley is not res judicata where there is a second complaint, a change in defendants, and an Order which is not applicable. Further, the law is well settled that a second complaint which does allege jurisdiction either directly or through an agent or alter ego, affords the plaintiffs an opportunity to confer jurisdiction over the person upon the Court.

The allegations of the complaint, although unnecessary in a complaint, do aver that the Court has jurisdiction over the person, and the allegations of the complaint must be deemed to be true for the purposes of the motion.

In any event, a denial of the motion would not have prejudiced the defendant since the challenge of jurisdiction is not waived, and therefore, since the Court permits the use of interrogatories and discovery to establish jurisdiction or can defer its decision upon a motion until the trial, such as was before Judge Carter, the plaintiffs-appellants should not be deprived of their day in Court, but should be given the opportunity to establish that the defendant-appellee, CROWN RADIO CORPORATION (JAPAN) did business

in this jurisdiction through its agent and alter ego, particularly within the purview of §302 of the New York Civil Practice Law and Rules, as is hereinafter discussed.

II

THERE IS JURISDICTION OVER THE PERSON OF CROWN RADIO CORPORATION (JAPAN) IN ACCORDANCE WITH THE PROVISIONS OF § 302 CPLR

> "In New York, in the absence of "Long-Arm" jurisdiction, a corporation must be "doing business" in this State in the traditional sense in order to be subject to in personam jurisdiction" (underscoring ours)

Thus it is most reassuring to know that even the defendant CROWN RADIO CORPORATION (JAPAN), which makes the instant motion, recognizes that such is the law in the absence of "Long-Arm" statutes. However, New York does have a "long-arm" statute, to wit, §302 of the CPLR.

That statute provides as follows:

> PERSONAL JURISDICTION BY ACTS OF NON-DOMICILIARIES. (a) Acts which are the basis of jurisdiction. As

to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary or his executor or admisistrator, who in person or through an agent:

1. Transacts any business within the state; or
2. commits a tortious action within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious action without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

   (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

   (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. ownes, uses or possesses any real property situated within the state.

* *

The first paragraph of subsection (a) of §302 of the CPLR specifically makes reference to any acts performed within the purview of §302 either by the defendant in person, or by the agent of such non-domiciliary.

Subdivision "1" of the statute covers the transaction of any business within the state by the defendant or its agent. In the present complaint (87a-99a; 29a-40a) now before this Court, the plaintiffs have shown, and corroborated by the affidavits submitted in opposition to the instant motion (100a-131a), that CROWN RADIO CORPORATION (NEW YORK) was not only represented by CROWN RADIO CORPORATION (JAPAN) to have been formed by it, but to have been admittedly its agent for the conduct and transaction of business in the United States. Further, a great part of that business was conducted by the agent and alter ego of CROWN RADIO CORPORATION (JAPAN), to wit, CROWN RADIO CORPORATION (NEW YORK) in the State of New York and more particularly in the City of New York by sales made by it for CROWN RADIO CORPORATION (JAPAN) to Ellis G. Rosen, Ltd., and others. The fact of the matter is the CROWN RADIO CORPORATION (JAPAN) and CROWN RADIO CORPORATION (NEW YORK) were so interchangeable to Ellis G. Rosen, that in his affidavit (12a-13a) submitted in support of the first motion he stated that he was the "manufacturer's representative". At no time did Ellis G. Rosen ever

state that Ellis G. Rosen, Ltd., was a distributor's representative, but used the term "manufacturer's representative". CROWN RADIO CORPORATION (NEW YORK) is not a manufacturer, but CROWN RADIO CORPORATION (JAPAN) is.

It is the very sales made by CROWN RADIO CORPORATION (NEW YORK) the agent and alter ego of CROWN RADIO CORPORATION (JAPAN), in New York that constituted the transaction of business within the state and indicates more than minimal contact in this State.

Subdivision (2) of §302 of the CPLR refers to the commission of a tortious act within the State. As to this portion of §302, the complaint specificially alleges the perpetration of a fraud upon the plaintiffs by CROWN RADIO CORPORATION (JAPAN) and its agent and alter ego CROWN RADIO CORPORATION (NEW YORK).

It is of particular significance that nowhere does the moving party deny that CROWN RADIO CORPORATION (NEW YORK) transacted business within this State, CROWN RADIO CORPORATION (JAPAN) merely contends that CROWN RADIO CORPORATION (NEW YORK) was

not its agent. However, the warranties and representations made to the plaintiffs-appellants by the representatives of CROWN RADIO CORPORATION (JAPAN) belie such denial as do the facts that there are directors and officers common to both CROWN RADIO CORPORATION (JAPAN) and CROWN RADIO CORPORATION (NEW YORK), that the printed material and borchures used by CROWN RADIO CORPORATION (NEW YORK) are printed in Japan and furnished by CROWN RADIO CORPORATION (JAPAN), (see exhibits), that there are admissions against interest contained in the exhibits annexed to the affidavits in opposition to the instant motion, the CROWN RADIO CORPORATION (JAPAN) owns virtually all the stock of its subsidiary and agent CROWN RADIO CORPORATION (NEW YORK), that it controls the Board of Directors and officers through its voting shares, that CROWN RADIO CORPORATION (NEW YORK) may not carry or sell or offer to sell or advertise any product not manufactured by CROWN RADIO CORPORATION (JAPAN), and that CROWN RADIO CORPORATION (NEW YORK) is under the complete dominion and control of CROWN RADIO CORPORATION (JAPAN).

Subdivision (3) of §302 of the CPLR is ap-

plicable where a tortious act is committed without the state causing damages to plaintiffs and where such defendant CROWN RADIO CORPORATION (JAPAN), in person, or through its agent, CROWN RADIO CORPORATION (JAPAN), regularly does or solicits business or derives revenue from goods used or consumed or services rendered in this state; or should reasonably expect such acts to have consequences in this state and derives revenue from interstate or international commerce.

The attention of the Court is respectfully directed to the fact that under subdivision 3 (i) the term solicits business is sufficient to confer jurisdiction. In the present action we have more than the solicitation of business by CROWN RADIO CORPORATION (JAPAN'S) agent, CROWN RADIO CORPORATION (NEW YORK), we have the admitted actual sales and regular course of conduct of business by CROWN RADIO CORPORATION (NEW YORK). Certainly, there can be no question as to the fact that this business is of both interstate and international commerce since CROWN RADIO CORPORATION (NEW YORK) has its base of operations in California, but does

sell and deliver to New York products made by its parent and master, CROWN RADIO CORPORATION (JAPAN), which is involved in international commerce.

II

While in various states a corporation must be "doing business" in the traditional sense in order to be subject to in personam jurisdiction, where such state has a "Long-Arm" statute, jurisdiction is determined on the basis of such statute.

The State of New York does have a "Long-Arm" statute, to wit, §302 of the CPLR.

1. Under N.Y.C.P.L.R. §302(a) which, the New York contact necessary in order to confer jurisdiction on a foreign corporation need only amount to the constitutionally permissible "minimum". International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). When that constitutionally satisfactorily minimum is achieved, New York, in personam jurisdiction, as to that cause of action to which the contacts relate, will be proper. Fummer v. Hilton Hotels Intern-

national, Inc., 19 N.Y. 2d 533, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967). See also, Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965).

Further, as the Court of Appeals is the Second Circuit said in Liquid Carriers Corp v. American Marine Corp., 375 F.2d 951, 955 (2d Cir. 1967), where no state case deciding the exact factual question presented has been decided by the state courts, the federal court is obliged to decide the issue as the New York courts would be expected to do.

The fact of the matter is that nowhere has the defendant-appellee, CROWN RADIO CORPORATION (JAPAN), asserted that these products are not shipped directly from CROWN RADIO CORPORATION (JAPAN) to customers in New York.

It is therefore respectfully contended that on the basis of the second complaint served and the affidavits with exhibits annexed thereto in opposition to the motion, that this Court has jurisdiction over the person of CROWN RADIO CORPORATION (JAPAN) under almost every subdivision of §302

of the CPLR.

There is one additional factor to be considered and that is the "doctrine of absolute liability". It is well established law that one who furnishes another with means of consummating a fraud is himself a wrongdoer. See, Globe Cardboard Novelty Co. v. Federal Trade Commission, 192 F2d 444. The second complaint in this action clearly establishes that CROWN RADIO CORPORATION (JAPAN) perpetrated a fraud against the plaintiffs with the able assistance of CROWN RADIO CORPORATION (NEW YORK). Under the doctrine of absolute liability, jurisdiction over CROWN RADIO CORPORATION (JAPAN) is obtained through its furnishing its agent, (even if CROWN RADIO CORPORATION (NEW YORK) were not its agent) with the instrumentality of perpetrating a fraud in this state.

CONCLUSION

The order appealed from should be affirmed and the motion denied in its entirety.

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US COURT OF APPEALS: SECOND CIRCUIT

AUTOMATIC RADIO CO.,
Plaintiffs-Appellants.,

against

CROWN RADIO CORP.,
Defendant-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York

That on the 26th day of December 1974 at 522 Fifth Ave,, New York deponent served the annexed Appellants Brief upon

Whitman & Ransom

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 26th day of December 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418050
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975